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No. 89-1368

In the Supreme Court of the United States

OCTOBER TERM, 1989

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly concluded that, in the circumstances of this case, contract rates between petitioner and the Southern Companies for the purchase and sale of electric capacity and energy had not become unjust, unreasonable, unduly discriminatory or preferential and that the public interest did not require that petitioner be relieved of its contractual commitments.

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OPINIONS BELOW

The order of the court of appeals affirming the Federal Energy Regulatory Commission's orders (Pet. App. 1a) is unreported. The opinions and orders of the Federal Energy Regulatory Commission and its administrative law judge (Pet. App. 4a-32a, 33a-36a, 37a-118a) are reported at 39 F.E.R.C. ¶ 63,026, 43 F.E.R.C. ¶ 61,003, and 43 F.E.R.C. ¶ 61,394.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1989, and a petition for rehearing was denied on November 27, 1989 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on

February 26, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of the court of appeals' affirmance of the Federal Energy Regulatory Commission's orders determining that two contracts for electric power between petitioner and Southern Companies had not become unjust or unreasonable under Section 206(a) of the Federal Power Act [1] and that the public interest did not require that they be set aside.

1. Petitioner is a public utility serving Texas and Louisiana. In February, 1982, petitioner entered into contracts with Southern Companies, a public utility holding company selling electricity in Alabama, Georgia, Florida, and Mississippi. Petitioner agreed to purchase 500 megawatts per year, for the period from June 1984 through May 1992, of Southern's then highly-economical, coal-fired electrical generating capacity (and associated energy) and agreed to terms and conditions of service on an interconnec-

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[1] Section 206(a) of the Federal Power Act (16 U.S.C. 824e(a)) provides in pertinent part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affect[ing] such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

tion to be established between petitioner and Southern. Pet. App. 41a-43a; Pet. 4.

When petitioner entered into these contracts, its River Bend Nuclear Plant was under construction and scheduled to begin operating in January of 1986. Petitioner planned to use Southern Companies' then comparatively inexpensive coal-fired power, its own coal-fired power, and, when it became available, its own nuclear power to meet base-load requirements. Petitioner planned to use comparatively expensive gas-fired and oil-fired power to meet demand during peak periods. On March 23, 1984, the Commission approved the contracts (with amendments agreed to by the parties) and found them just and reasonable and in the public interest. *Southern Co. Services, Inc.*, 26 F.E.R.C. ¶ 61,300 (1984); Pet. App. 44a-47a.

2. By 1985, demand for electricity had fallen, and oil and gas prices had dropped. Petitioner's problems increased when the Louisiana Public Service Commission and the Public Utilities Commission of Texas found petitioner to have been imprudent in entering into the contracts with Southern and refused to permit full recovery of those charges in retail rates. Petitioner and Southern proceeded with negotiations concerning relief for petitioner, but they ultimately reached an impasse. Pet. App. 47a-49a.[2]

On July 2, 1986, petitioner filed suit in the Eastern District of Texas against Southern, charging Southern with breach of contract, the torts of bad faith

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[2] Both the administrative law judge and the Commission determined that there was no contractual basis for relieving petitioner of its commitments. Pet. App. 8a-9a, 29a-30a, 90a, 98a. Petitioner has not sought review of this aspect of the decisions.

dealing and fraud, and a violation of the Texas Deceptive Practices-Consumer Protection Act. Pet. App. 49a; *Gulf States Utilities Co.* v. *Alabama Power Co.*, No. B-86-634-CA (E.D.Tex).[3] The suit is pending in district court.

3. In the wake of the filing of the lawsuit, in August, 1986, both petitioner and Southern sought concurrent relief from the Commission, and the matters were consolidated and set for hearing. On May 12, 1987, after an extensive evidentiary hearing, the administrative law judge (ALJ) issued his opinion. Pet. App. 37a-118a. The ALJ concluded that the contracts had not been shown to be unjust, unreasonable, unduly discriminatory or preferential or contrary to the public interest under Section 206(a) of the Federal Power Act. Rather, he found that the contract rates were based on Southern's cost of service. Pet. App. 58a-65a. He also concluded that the "changed circumstances" complained of by petitioner were—with the exception of the state regulatory commissions' actions—foreseeable and had actually been considered by the parties (*id.* at 74a); that there was no unfair distribution of contractual benefits and burdens (*id.* at 74a-82a); that petitioner's financial difficulties stemmed primarily from its failure to secure rate relief in connection with its River Bend Nuclear Plant (*id.* at 87a); that relief under the contracts at issue here would not have relieved petitioner's cash-flow problems (*ibid.*); that price differences between Southern's rates to petitioner and to its full requirements customers were

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[3] Southern appealed the district court's exercise of jurisdiction, and the Fifth Circuit affirmed the district court's authority to resolve some aspects of the dispute and remanded the case. See *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465, modified, 831 F.2d 557 (1987).

justified and, therefore, not unduly discriminatory or preferential (*id.* at 112a); that the contracts did not adversely affect the public interest (*id.* at 91a); and that maintaining the stability and integrity of public utility contracts was in the public interest (*ibid.*).

4. On April 1, 1988, the Commission affirmed. The Commission, although not convinced of the legal relevance of some of petitioner's contentions, considered all the evidence in the record, and concluded that grounds for modification of the contracts had not been established. The Commission determined that the "pricing mechanism in the * * * contract is not unjust, unreasonable, unduly discriminatory or preferential." Pet. App. 11a. The Commission explicitly adopted the ALJ's decision on a number of points, including unforeseen changed circumstances, equitable considerations, and the effect of the state commission decisions upon the justness and reasonableness of the parties' agreements. *Ibid.* The Commission also specifically addressed petitioner's contentions, in light of the evidence in the record, concerning the relative burdens and benefits under the contract (*id.* at 17a-18a), petitioner's financial situation (*id.* at 19a-20a), Southern's alleged lack of reliance and need for capacity (*id.* at 21a-23a), and the claimed lack of efficiency resulting from the contracts (*id.* 23a-25a). The Commission concluded that none of these factors justified modification of the contracts, particularly in view of the statutorily required "value of preserving contract stability in the electric utility industry." *Id.* at 24a.

On June 1, 1988, the Commission denied petitioner's motion for rehearing. Pet. App. 33a-36a.[4]

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[4] Petitioner had been depositing the amounts owed under the contracts with the district court in Texas. Eventually,

5. In a brief, per curiam order issued on September 22, 1989, the court of appeals affirmed. The court noted that its affirmance was "[s]ubstantially for the reasons stated by the Commission." Pet. App. 1a.

ARGUMENT

The court of appeals correctly upheld the Commission's decision that, under Section 206(a) of the Federal Power Act, the contracts between petitioner and Southern had not become unjust, unreasonable, or unduly discriminatory or preferential. The Commission properly emphasized that Southern received no more than the seller's cost of service, including a reasonable return on its investment—a long-established basis for determining the justness and reasonableness of a rate[5]—and that none of petitioner's asserted "non-cost considerations" justified modification of the contract. Pet. App. 8a, 10a-12a.

Petitioner nevertheless contends (Pet. 14) that the Commission erred by failing to give proper consideration to three factors: (1) the disparity between its

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however, it stopped making those deposits. In June, 1988, Southern received permission from the Commission to suspend its service to petitioner. *Southern Co. Services, Inc.*, 44 F.E.R.C. ¶ 61,290, at 62,039-62,041 (1988). See also Pet. 10-11 n.13.

[5] See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 596, 603 (1944); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 596-598 (1942). Cf. *Duquesne Light Co.* v. *Barasch*, 109 S. Ct. 609, 619 (1989). Because of the similarity between Sections 205(e) and 206(a) of the Federal Power Act (16 U.S.C. 824d(e), 824e(a)) and Sections 4(e) and 5(a) of the Natural Gas Act (15 U.S.C. 717c(e), 717d(a)), decisions construing the "just and reasonable" requirement of the Natural Gas Act provisions are applicable to the Federal Power Act provisions. See, *e.g.*, *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 349-353 (1956).

burdens and Southern's benefits; (2) its financial circumstances; and (3) the applicability of the "*Mobile-Sierra*" doctrine to a purchaser. With respect to each of these issues, however, the Commission specifically considered the evidence in the record and rejected petitioner's claim. These fact-based determinations do not warrant review.

1. Petitioner primarily objects (Pet. 15-20) to the Commission's treatment of its argument concerning a disparity between its burdens and Southern's benefits. The Commission observed that the considerations raised by petitioner in support of this claim were "not germane to an assessment of the contracts' justness and reasonableness." Pet. App. 15a. Despite this statement, however, the Commission also carefully considered petitioner's argument in light of the evidence, and rejected it on the basis of the facts in the record: "Assuming *arguendo* that [petitioner's] burdens/benefits arguments are appropriately considered, [petitioner] has failed to establish that it is suffering 'losses' under the contract, while the Southern Companies are reaping 'benefits' in excess of their costs." *Id.* at 17a. The Commission concluded that the evidence simply did not support petitioner's claim (*id.* at 17a-18a); the Commission emphasized, for instance, that the analysis of benefits and burdens prepared by petitioner's witness was erroneous in several respects, and that the witness himself had conceded error in the analysis. *Id.* at 14a, 17a-18a. Thus, contrary to petitioner's contention, its argument concerning benefits and burdens received full consideration by the Commission and was rejected on the basis of the evidence in the record.[6]

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[6] Indeed, petitioner acknowledges that the Commission evaluated its claim in light of the evidence in the record, but seeks

2. Petitioner also objects (Pet. 14) to the Commission's treatment of its financial hardship argument. The Commission suggested that it was "not convinced" that financial hardship, even if substantiated by the evidence, "would justify relief under section 206(a) of the FPA from [petitioner's] contracts with the Southern Companies under the circumstances presented by this case." Pet. App. 19a. Again, however, the Commission went on to consider fully petitioner's claim in light of the evidence in the record: "In any event, we are not persuaded by the evidence that relief would be warranted in this case for the reasons advanced by [petitioner] in this proceeding, even if financial hardship were a proper basis for relief." *Ibid.* The Commission observed that the evidence in the record did not support petitioner's claim that the contracts with Southern were the reason for its financial difficulties (*id.* at 19a-21a); the Commission also noted that the cross-examination of petitioner's chief financial officer undermined the credibility of petitioner's financial hardship argument. *Id.* at 20a. Here, too, the Commission explicitly rejected petitioner's contention on the basis of the evidence in the administrative proceeding.

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to minimize the significance of that review. Pet. 20 n.27. Petitioner's reliance on *Schwabacher* v. *United States*, 334 U.S. 182 (1948), moreover, is misplaced. In *Schwabacher*, "the record indicate[d]" that the Interstate Commerce Commission might have declined to consider certain claims because it believed it did not have jurisdiction. *Id.* at 201. Here, in contrast, the record reveals that the Commission fully considered petitioner's claims, and rejected them on the basis of the evidence before it.

3. Finally, petitioner objects (Pet. 26-28) that the Commission has refused to apply the "*Mobile-Sierra*" doctrine to purchasers.[7] The Commission, however, found it unnecessary to address this issue:

> With respect to [petitioner's] *Mobile-Sierra* financial hardship argument, we need not decide, in this case, whether it is appropriately raised by a purchaser which seeks to be relieved of its contractual obligations, rather than by a seller. Whatever the parameters of the *Mobile-Sierra* standard, we find * * * that [petitioner] has not demonstrated that the contracts with the Southern Companies should be modified on account of financial considerations.

Pet. App. 13a. The Commission then proceeded to address petitioner's claim of financial hardship and misallocation of benefits and burdens, as previously described, and concluded that the record did not support petitioner's contention regarding these points. As a result, the *Mobile-Sierra* issue that petitioner raises was explicitly reserved by the Commission; the state of the record in this proceeding did not require its resolution. Such a disposition does not afford a basis for this Court's review.

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[7] See *United Gas Pipeline Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Corp.*, 350 U.S. 348 (1956). Under this doctrine, the Commission may modify a rate if the fixed rate is "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excess burden, or be unduly discriminatory." *Sierra Pacific*, 350 U.S. at 355. See also Pet. App. 12a n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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* The Solicitor General is disqualified in this case.

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